
**IN THE
SUPREME COURT OF MISSOURI**

No. SC84211

IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS

**Cole County
Case No. CV186-1282CC**

**APPEAL FROM THE COLE COUNTY CIRCUIT COURT
HONORABLE WARD B. STUCKEY
SPECIAL JUDGE**

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JURISDICTIONAL STATEMENT

The trial court, in its Order and Judgment, determined that inasmuch as Art. IV, § 15, Mo. Const., restricts the duties that may be imposed upon the State Treasurer to those relating to “the receipt, investment, custody and disbursement of state funds and funds received from the United States government” and inasmuch as “the funds in question are not state funds or funds received from the United States government,” the “State Treasurer had no standing or right to assert claims against the funds in Case No. CV186-1282CC” (L.F. 372; App. A to this Brief). In effect, the trial court held Section 447.575, RSMo, authorizing the State Treasurer to take actions to collect unclaimed property was unconstitutional because it assigned such duty to the State Treasurer contrary to the provisions of Art. IV, § 15, Mo. Const. Because the validity of a statute is involved, this Court has exclusive jurisdiction of this appeal under Art. V, § 3, Mo. Const.

INTRODUCTION

The appeal in this case, SC84211, involves legal issues that are common to those issues in SC84210, as well as in SC84212 and SC84213. The Points on Appeal raised by Appellant Nancy Farmer in each of her four appeals are virtually identical.

Respondent Trustee Elaine Healey, in this appeal, is in a similar position to Respondent Receiver Julie Smith in SC84210, Respondent Receiver Jackie Blackwell in SC84212 and Respondent Receiver Sharon Morgan in SC84213. Respondents Healey, Smith, Blackwell and Morgan are represented by the same counsel in these four appeals. Oral arguments with respect to these four appeals are being consolidated.

There are some factual differences in the underlying cases below which may or may not need to be reached, depending upon what issues may ultimately be determined by the Court to be dispositive insofar as the appeals are concerned. Consequently, it is appropriate that the Statement of Facts in this Brief of Respondent Healey set forth separately those facts which are relevant to this case in the trial court and this appeal.

In other respects, for Respondent Healey to simply set forth the same arguments and authorities in this Brief as those set forth in the Brief of Respondent Smith in SC84210 results in the expenditure of more time by the Judges of this Court in reading and considering Briefs, as well as another “tree being cut” to provide the necessary paper.

Consequently, Respondent Healey incorporates by reference the statements, authorities and arguments set forth in the Brief of Respondent Smith in SC84210 into this Brief. Where additional statements, authorities or arguments to those contained in the Brief of Respondent Smith in SC84210 are appropriate, they are hereinafter set forth.

STATEMENT OF FACTS

The Old Security Life Insurance Company Receivership

Old Security Life Insurance Company (“Old Security”) was placed into receivership by order of the Cole County Circuit Court on October 20, 1977. *State ex rel. ISC Corp. v. Kinder*, 684 S.W.2d 910, 911 (Mo. App. W.D. 1985). That case was docketed as “Jerry B. Buxton, Director of the Division of Insurance, Plaintiff, v. Old Security Life Insurance Company, Defendant”, Case No. 29686. L.F. 19. The Old Security Receivership proceedings were very successful in recovering funds. As stated in *Ainsworth v. Old Security Life Insurance Co.*, 685 S.W.2d 583, 584 (Mo. App. W.D. 1985):

“It appears that there will remain after the payment of all claims against the insurance company and the payment of the expenses of the receivership a balance for distribution in the range of 20 million dollars.” (Emphasis added).

There were various contentions concerning how those excess monies should be distributed. Those contentions included (i) “a suit in the nature of an interpleader and class action within the receivership proceeding” on behalf of the claimants who had been paid seeking additional amounts, (ii) taxes of \$1,000,000 claimed by the United States and taxes of \$800,000 claimed by Missouri, (iii) claims by the former special counsel for the receiver for additional compensation, (iv) claims by the commissioners of claims for additional compensation and (v) claims by ISC Financial Corporation (“ISC”), the owner of all of the stock in Old Security. 685 S.W.2d at 583-585.

An “Adversary Proceeding” styled “Buxton v. Old Security Life Insurance Company, Adversary Proceeding, Crist v. ISC Financial Company and the Kansas Life & Health Insurance Guaranty Association” was filed within the receivership case (the “Class Adversary Proceeding”).

L.F. 19. That action was referred to in 685 S.W.2d at 584 as a “suit in the nature of an interpleader and class action within the receivership proceeding”. Lewis Crist, as Acting Director of Insurance and Receiver of Old Security, initiated the Class Adversary Proceeding to determine the disposition of the excess funds (those over and above the amounts needed to pay claims) and joined ISC Financial Corporation (“ISC”) and the Kansas Life and Health Insurance Guaranty Association (“KIGA”) as parties. A-42.¹ On March 13, 1984, the Court certified the Adversary Class Proceeding as a class action and designated KIGA as the class representative of a class consisting of claimants who had been allowed and paid a claim of \$15 or more in the Old Security insurance receivership proceedings, excluding administrative claimants. A-42 – A-43. After discovery the parties reached a settlement in late 1985 which is set forth in the Settlement Agreement. A-41. A net amount of \$5,150,000 was set over from the excess funds under the Settlement Agreement for the class members, fees of class counsel and expenses in connection with the Class Adversary Proceeding were paid from the excess funds, \$500,000 was retained from the excess funds by Receiver Crist as a reserve for additional claims and expenses of the insurance receivership, and the balance was paid over to ISC. L.F. 13, 19-23, 380, A-50 – A-51.

The Settlement Agreement provided for Receiver Crist to “pay, from the assets of the

¹ The January 18, 1991, Order Establishing Trust (L.F. 72-80) references a Settlement Agreement of February 4, 1986, filed in the Class Adversary Proceeding. A copy of that Settlement Agreement, less exhibits, has been secured from the Cole County Circuit Clerk’s microfilm records in Case No. 29686 and is set forth in Appendix F at A-41 to this Brief. That Settlement Agreement more fully describes the Class Adversary Proceeding.

Receivership Estate” the sum of \$5,150,000 to the Class Attorneys, with the Receiver providing as well a computerized name and address list of the class members whose claims against Old Security had been allowed and paid. Class counsel were directed to mail checks by first class mail to the class members and to use reasonable efforts to locate class members who checks were returned undelivered, including using specialized locator services. The Settlement Agreement further provided that after three months from the date of the mailing of the checks, that class counsel would submit a report of amounts distributed which would be audited by an independent accounting firm, and

“Any sums remaining shall be subject to further order of the Court.”

A-47.

The Settlement Agreement was approved by the Court, distribution was made by class counsel as provided in the Settlement Agreement and the distribution was in turn audited by a firm of certified public accountants. L.F. 21.

After hearing evidence in the Class Adversary Proceedings in Case No. 29686 and also filed in CV186-1282CC (L.F. 19), Judge Kinder in his Findings of Fact and Order Regarding Distribution of Settlement Proceeds entered on December 31, 1986:

- Found that \$4,741,364.37 had been disbursed and received by members of the class and \$53,891.65 had been withheld for taxes, for a total of \$4,795,256.02. L.F. 20.
- Found that \$132,713.47 in checks had been issued to class members but those checks had not cleared. Related to those checks were withholdings of \$13,309.81 for taxes. L.F. 20.
- Found that it would not be practicable to engage Creditors Exchange to attempt to locate those class members who had not cashed checks unless the amount involved was

\$100 or more because Creditors Exchange charged a fee of \$7.50 per person plus an additional \$7.50 for each person located and thus directed referral to Creditors Exchange only where the amount involved was \$100 or more. L.F. 23.

- Found that \$208,877.17 in checks had not been issued with respect to missing class members that had not been found. L.F. 20.
- Determined that class attorneys had used their best efforts to locate missing class members, and that no further efforts should be made to locate missing class members except for 21 class members identified by name. L.F. 22-23.
- Determined that no further notification to missing class members was necessary except for annual publication in the *St. Louis Post Dispatch*, the *Kansas City Star-Times* and the *Jefferson City News Tribune*. L.F. 23-24.
- Determined that it “is in the best interests of the unlocated class members that the remaining funds be held by the Court indefinitely, pending the possible filing of their claims. The funds can best be administered by a specially appointed receiver, as further provided herein and by a separate order also entered on this date *In Re Old Security – KIGA Class Action*, Case No. CV186-1282, Cole County Circuit Court.” L.F. 24.
- Directed the class attorneys and Director of Insurance Lewis Crist as statutory receiver of Old Security to pay funds which they held for the class to Elaine Healey, as Receiver. L.F. 24.
- Directed the Receiver, after consulting class counsel, to pay class members reflected on

certain exhibits who were located. L.F. 25.

- Directed the Receiver to publish annually a notice drafted by class attorneys listing the names of unlocated class members and advising that monies were held for them.

L.F. 26.

- Directed that all expenses and administrative and legal fees regarding the funds held by the Receiver be paid from the interest on those funds. L.F. 26.

The KIGA Class Action Funds Receivership

Contemporaneously with the entry on December 31, 1986, of the Findings of Fact and Order Regarding Distribution of Settlement Proceeds discussed above, Judge Kinder entered an Order Appointing Receiver in which he appointed Elaine Healey as Receiver of the funds “from a class action settlement which cannot now be distributed to individual class members”. L.F. 13. The Court in that Order found:

“These funds must be held and administered so that they will be available to yet unlocated class members. From the Court’s experience to date with respect to the administration of such funds, it is apparent that it will be necessary to hold and administer these funds for a lengthy period of time. The Court has concluded as well that the expense of administering the funds should be borne by the funds themselves and, in particular, from the interest being generated from the investment of those funds. The responsibility for administering those funds now falls upon the undersigned judge. . . . The Court further does not believe that it is fair to impose upon the Circuit Court Clerk, herself, the additional responsibilities that are engendered by a close monitoring of the investment of those funds. . . . The Court also intends that those responsibilities

be exercised only by someone in whom this Court has complete confidence and also by one who is readily available to the Court. . . . The Court believes as well that the investment decisions with respect to those funds should be retained by the Court itself. . . .” L.F. 13-14.

The Court then considered the provisions of Rule 68.02 authorizing a circuit court to appoint a receiver to “keep, preserve and protect any . . . money . . . deposited in court.” L.F. 14. The Court’s Order directs:

“2. That as such receiver, she is directed to perform those administrative duties which, absent the appointment of a receiver, would be performed by the Circuit Clerk under the provisions of Section 483.310, RSMo – with the provisions of Section 483.310, RSMo, continuing to govern the investment of funds and the application of interest received from the fund.

* * *

“4. That the Court reserves unto itself the final investment decisions. . . .

“5. . . . All such valid claims submitted and approved by the Court shall be paid by the receiver.

“6. . . . [T]hat interest received from such investments shall be paid over directly to the receiver. . . . From such interest which is received the receiver shall first pay therefrom the lawful expenses and fees regarding the administration of the funds . . . , there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purposes specified and allowed for such Clerk in subsection 2 of Section 483.310, R.S.Mo. and the remaining balance shall be paid into

the general revenue fund of Cole County as provided in subsection 2 of Section 483.310, R.S.Mo. . . .

“7. That the receiver is directed to secure and maintain a bond. . . .

“8. That the receiver is authorized and directed to pay over to herself personally from such interest so received the sum of Two Hundred Dollars (\$200.00) per month as compensation for her services. . . as receiver. . . .

“9. That until the further order of the Court the receiver is authorized from time to time to pay such other expenses in the administration of the receivership as may from time to time be necessary; provided, however, (a) that no such expenditures for such other expenses in excess of \$250 shall be made without the written approval of the Court. . . .” L.F. 15-17.

Elaine Healey, as Receiver, in the first part of 1987, received from Lewis Crist, the statutory Receiver of Old Security, and from class counsel funds in the amount of \$245,855.29, plus accumulated interest of \$42,870.42, for a total of \$288,725.71. L.F. 47-48.

In July of 1987, the Receiver cause a Notice listing the names of unlocated class members to be published in the *St. Louis Post-Dispatch*, the *Kansas City Times* and the *Jefferson City News Tribune*. L.F. 27-45. In her Report filed with the Court on September 3, 1987, Respondent Healey as Receiver reported that during the period of January 9, 1987, through September 1, 1987, disbursements in the amount of \$159,263.45 had been made to claimants. See also, Applications and Orders thereon approving payments to claimants. L.F. 375-378, 384-385.

On May 25, 1988, Judge Kinder entered an Order directing that no further annual publications of notice be published, finding that the cost of such was not “appropriate or financially feasible”. In

doing so, he relied upon information provided by Receiver Healey that the costs for the July of 1987 publications was \$4,174.14 which resulted in only seven claims totaling \$502.20 that were verified as being proper. L.F. 53.

January 18, 1991, Order Establishing Trust

On January 18, 1991, Judge Kinder entered an “Order Establishing Trust for Undistributed Class Action Proceeds”. This Order is set forth in Appendix C to this Brief at A-12. By this Order, the Court terminated the Receivership and created an ongoing Trust to hold and administer the undistributed class action proceeds. L.F. 72-80.

In his Order establishing the Trust, Judge Kinder determined that “title to the fund created by a certain Settlement Agreement entered into in the former proceeding on February 4, 1986”, had been “transferred to Elaine S. Healey, as Receiver of Funds”; that “the Receiver was to hold the fund transferred to her for the benefit of such class members as might later assert claims”; and that “[c]laims continue to be made against the settlement fund but only infrequently”. L.F. 72.

The Court then made the following concluding determinations in its January 18, 1991, Order:

“Despite the reduced rate at which claims occur, the fact that they continue to be asserted convinces the court that the fund created by the Settlement Agreement should remain available so that the intent of the Agreement can continue to be satisfied as claimants step forward. In the meantime, the court believes that the income which results from the investment of the fund should be used for purposes consistent with those underlying the Settlement Agreement. It is the opinion of the court that one such purpose would be the provision of monies to make the courts of this county better able to resolve major litigation matters of statewide interest, such as the action which gave

rise to this settlement.” (Emphasis added) L.F. 73.

Judge Kinder then ordered that “the fund now held by Elaine S. Healey, as Receiver of Funds in Case No. CV186-1286 (sic) be, and hereby is transferred in trust to Elaine S. Healey, as trustee, . . . to have and to hold by said trustee and her successor trustees, subject to the . . . conditions” set forth in the balance of the January 18, 1991, Order. L.F. 73. Those “conditions” included:

- Income from Trust – “The trustee shall hold, manage, invest and reinvest the property of the trust, shall collect and receive the income therefrom, and after deducting all necessary expenses incident to the administration of the trust, shall dispose of the net income by paying over to the Cole County Commission, from time to time, those amounts of such income which have accumulated since the last such payment was made.” L.F. 73-74.
- Payments from Principal – “Nonetheless, and any other provision of this order to the contrary notwithstanding, the trustee shall, at any time, cause such amounts from the principal of the trust estate, up to the whole amount thereof, to be paid or applied for the benefit of any claimant entitled – in the opinion of the trustee, after due consultation with Class Attorneys – to share in the fund created by the Settlement Agreement.” L.F. 74.
- General Powers of the Trustee. L.F. 73-77.
- Termination of Trust – “This trust shall cease and terminate whenever the purpose thereof has been accomplished through the payment of all of the principal to claimants properly entitled to shares of the same pursuant to the Settlement Agreement”. L.F. 77.

- Appointment and Compensation of Trustee – Court may remove a trustee and may appoint a successor trustee; compensation of the trustee to be fixed by the Court. L.F. 77-78.
- Amendment of Trust – Court retains power to amend the Trust. L.F. 79.

No appeal was taken or attempted to be taken from the January 18, 1991, “Order Establishing Trust for Undistributed Class Action Proceeds”.

Collection and Administrative Duties Imposed on State Treasurer in 1993

Since July 1, 1993, Section 447.575, RSMo 1994 (and 2000), has provided that the State Treasurer has the duty to collect unclaimed property subject to the Unclaimed Property Act and to then generally administer the Act. See generally, Section B of House Bill 566 enacted in 1993.

Proceedings Re the Unclaimed Property Act

The Circuit Court files and the record reflect that the Director of Insurance, the Missouri Attorney General, the Missouri Director of Economic Development, the Missouri State Treasurer, the Missouri State Auditor or the Missouri Attorney General did not make any claim or assertion between December 31, 1986, and January 4, 2000, that the funds held by the Receiver or Trustee in Case No. CV186-1282CC should be paid over to the Director of Economic Development or the State Treasurer as unclaimed property pursuant to the Unclaimed Property Act. Earlier audits of the Cole County Circuit Court had been conducted by the State Auditor. On January 4, 2000, State Auditor Claire McCaskill issued Audit Report No. 2000-01 with respect to the Nineteenth Judicial Circuit in which she “. . . recommended the circuit judges review these receivership cases and determine whether the receivership assets should be distributed to the state Unclaimed Property Section or should be disposed of in another manner” (Emphasis added, Appellant’s Brief, App. 2).

On April 30, 2001, the Attorney General filed a Petition for Writs of Prohibition and of Mandamus in the Western District of the Missouri Court of Appeals styled “State ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Relator v. Cole County Circuit Judges Byron L. Kinder and Thomas J. Brown, III, Respondents”, and docketed as Case No. WD 59910, requesting the issuance of writs directing that the funds and interest thereon in this case and the three companion cases be transferred to the State Treasurer pursuant to the Unclaimed Property Act. L.F. 398, 159. Prior to the filing of the Petition in the Court of Appeals, the Attorney General did not seek relief by motion or petition filed in this case or in the three companion cases. State Treasurer Farmer advised Judges Kinder and Brown that the action in the Court of Appeals was filed by the Attorney General without consulting with or notifying the State Treasurer. The State Treasurer further advised Judges Kinder and Brown that she had no claim to any interest on the funds. L.F. 398-399. On May 3, 2001, Judges Kinder and Brown appointed Alex Bartlett as counsel for the Receivers and Trustee in this case and the three companion cases, directed that he file opposing suggestions in the Attorney General’s action in the Court of Appeals, directed that he attempt to negotiate a settlement and authorized him to take additional necessary or appropriate actions. L.F. 400-401. The Attorney General’s Petition for Writs of Prohibition and Mandamus in the Western District of the Missouri Court of Appeals was denied on May 30, 2001. L.F. 159.

On June 28, 2001, the Attorney General filed a quo warranto action against Judges Kinder and Brown in the Osage County Circuit Court which was docketed as Case No. 01CV330548, with notice being given by telephone that morning to attorney Alex Bartlett in Jefferson City. At noon on the same day the Attorney General presented the Petition in Case No. 01CV330548 to Circuit Judge Jeff W. Schaperkoetter in Union in Franklin County. The Attorney General secured the issuance of a

Preliminary Order in Quo Warranto which deviated from Supreme Court Form 12 and provided that Judges Kinder and Brown “are restrained and enjoined from appropriation or expending” any of the funds in this case and the three companion cases. L.F. 159-160. The Attorney General’s appeal from the dismissal of that case by Circuit Judge Gael Wood now pends in this Court as SC84301.

By letter dated July 16, 2001, the Attorney General, on behalf of the State Treasurer, demanded that Respondent Healey deliver the funds she holds as Trustee in this case to the State Treasurer by 5:00 p.m. on July 20, 2001, or face a personal penalty of up to \$10,000 per day. L.F. 160-161, 170-171. At that time, Respondent Healey, under the provisions of the Trust created by the Order of January 18, 1991, was prohibited from making such a disbursement, and Judge Kinder was prohibited by the Preliminary Order in Quo Warranto from entering any order effecting an appropriation or expenditure of the funds. L.F. 159-160.

On July 20, 2001, Respondent Healey filed her “Motion and Petition for Joinder of Additional Parties and for Relief in an Ancillary Adversary Proceeding in the Nature of Interpleader and for Other Relief” (“Motion and Petition”). L.F. 156. A copy of the Motion and Petition is set forth as Appendix D to this Brief at A-21. In her Motion and Petition the Respondent Trustee noted the contentions of the Attorney General, the July 16 demand to turn over the funds which she held, the extant orders of the Court which prevented her from doing so and the extant order in the Quo Warranto action against Judges Kinder and Brown which prevented them from entering any order transferring the funds. L.F. 159-160. The Respondent Trustee further reported that efforts to settle the disputes with the State Treasurer had been thwarted by the Attorney General. L.F. 161. The Respondent Trustee asserted that the Court is not required to turn over the funds to the State Treasurer pursuant to the Unclaimed Property Act, but instead has authority to make a different disposition of the funds. L.F. 166.

The Respondent Trustee requested that the Court direct that there be separate ancillary adversary proceedings to determine the following questions:

- “a. Whether the interest income upon the funds in this case for as long as they are held by the Receiver or under the control of the Court can be used (i) to pay the expenses incurred in preserving the funds, and (ii) to pay court-related expenses as provided in Section 483.310, RSMo; and (iii) whether the remainder of the interest income monies are payable to Cole County.
- “b. Whether the funds in this case must be distributed now or whether they can continue to be held in the registry of the Court.
- “c. If it is determined that the funds can no longer continue to be held in the registry of the Court, whether the funds must be disbursed to the State Treasurer to be administered under the Missouri Uniform Disposition of Unclaimed Property Act or whether the Court can make a different disposition of the funds.”

L.F. 167.

The Motion and Petition requested that the proceedings be denominated as “Ancillary Adversary Proceedings”, that no other questions be considered in the Ancillary Adversary Proceedings, and that if it was determined that the funds in this case were not required to be disbursed to the State Treasurer pursuant to the Unclaimed Property Act, the continued holding or the disposition of the funds be determined in further proceedings. L.F. 168.

The Motion and Petition asked that the State Treasurer, the Circuit Clerk and Cole County be joined as parties in the Ancillary Adversary Proceedings to assert any claims they might have to the funds. L.F. 168. The Motion and Petition noted that in *Crist v. ISC Financial Corp.*, 752 S.W.2d

489 (Mo. App. W.D. 1988), it had been held that the Circuit Clerk and Cole County (L.F. 167) were indispensable parties when the matter of interest on funds, held under the Circuit Court's authority, were in question.

On July 20, 2001, Judge Kinder entered an Order which sustained the Motion and Petition of the Receiver. L.F. 172. A copy of that Order is set forth as Appendix E to this Brief at A-37. That Order provided:

“2. A separate trial and proceedings are hereby ordered with respect to the Ancillary Adversary Proceedings Questions as defined in the Trustee's Motion and Petition, which shall be known as the Ancillary Adversary Proceedings and shall be captioned as [In Re Ancillary Adversary Proceedings Questions]. . . .

“3. The only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceedings Questions . . . and the joinder . . . shall not make such person or entity a party for any other purpose in this case.

“4. The Honorable Nancy Farmer as State Treasurer of Missouri, is hereby ordered added as a party to the Ancillary Adversary Proceedings, and it is ordered (i) that a copy of this Order and the Trustee's Motion and Petition be served upon the Honorable Nancy Farmer, (ii) that the . . . State Treasurer within 30 days of such service file . . . a pleading asserting any claims which she . . . has under the . . . Unclaimed Property Act to the funds in this case. . . .

“5. Cole County and Ms. Debbie Cheshire as the . . . Circuit Clerk are hereby added as parties to the Ancillary Adversary Proceedings. . . .

“6. The Trustee . . . through her attorney . . . is hereby authorized and directed to

participate in the Ancillary Adversary Proceedings to insure that there is a full presentation and exposition of the facts and legal issues. . . .

“7. . . . [O]ther persons . . . may be allowed to intervene . . . as an interested person or to appear as amicus curiae. . . .” (Emphasis added) L.F. 173-174.

In his July 20, 2001, Order, Judge Kinder noted the pendency of the quo warranto action in the Osage County Circuit Court. He then recused himself from a determination of the Ancillary Adversary Proceedings Questions for which a separate trial and proceedings had been ordered, requested that the Supreme Court assign a Special Judge to hear and determine the Ancillary Adversary Proceedings Questions and “retain[ed] jurisdiction with respect to all other issues and matters in this case, including . . . the determination of the holding or disposition of any funds which are determined in the Ancillary Adversary Proceedings to not be required to be disbursed to the State Treasurer by reason of the . . . Unclaimed Property Act.” L.F. 174-175. The Motion and Petitions and the Orders entered on July 20, 2001, in SC84210, SC84211, SC84212 and SC84213 are substantially similar.

On July 25, 2001, the Supreme Court assigned the Honorable Ward B. Stuckey as Special Judge in “In Re Ancillary Adversary Proceedings Questions, Case No. CV186-1282CC.

On July 25, 2001, the Attorney General filed a Petition in the Circuit Court for Petitioner Nancy Farmer against Judge Kinder, Judge Brown, this Respondent, Julie Smith (Respondent in SC84210), Jackie Blackwell (Respondent in SC84212) and Sharon Morgan (Respondent in SC84213). Insofar as the funds in this case are concerned, in that Petition the Attorney General sought a mandatory injunction directing Judge Kinder and Respondent Trustee to turn over the monies held by the Trustee and interest previously earned and an order directing Judge Kinder and Respondent Healey to pay penalties personally. L.F. 18 in SC84328.

The State Treasurer on August 20, 2001, filed a Motion to Vacate and Disqualify in the Ancillary Adversary Proceedings which requested that the July 20, 2001, Order be vacated and that Judges Kinder and Brown be disqualified. L.F. 177. On September 10, 2001, Cole County filed its Pleading in Response to Court Order in the Ancillary Adversary Proceedings, and on September 20, 2001, the Claims and Position of the Cole County Circuit Clerk were filed in the Ancillary Adversary Proceedings. L.F. 215, 220.

On October 12, 2001, Respondent Healey and the Receivers filed their Motion for Judgment on the Pleadings in the Ancillary Adversary Proceedings in this case and in the cases that are now on appeal to this Court as SC84210, SC84212, SC84213 and SC84328, as well as in Case No. 01CV325409 which remains pending before Judge Stuckey in the Cole County Circuit Court. L.F. 240. That Motion incorporated by reference the pleadings and motions in the other cases into this case, including Respondent Healey's First Amended Motions in Case No. 01CV324800 (L.F. 50 in SC84328).

The State Treasurer's Motion to Vacate, the Motion for Judgment on the Pleadings of the Receivers and Trustee, a Motion for Judgment on the Pleadings by Judges Kinder and Brown in Case No. 01CV324800 (L.F. 36 in SC84328) and Judge Brown's Motion for Consolidation (L.F. 220 in SC84328) were all noticed for hearing on October 18, 2001, before Judge Stuckey.

On October 18, 2001, prior to the commencement of the hearing before Judge Stuckey, Respondent Healey filed her Motion for Order Directing Hearing After the Conclusion of the Ancillary Adversary Proceedings to Consider Disposition of Funds. That Motion requests, if it be determined in the Ancillary Adversary Proceedings that the Court has authority to distribute the funds other than to the State Treasurer pursuant to the Unclaimed Property Act, the trial court to enter an order directing public

notice of a hearing at which time interested persons could be heard re the disposition of the funds in this case. L.F. 402. On October 18, 2001, the State Treasurer filed her Objections to Various Motions (L.F. 250-257) and her Suggestions in Opposition to Various Motions (L.F. 258-363).

On October 18, 2001, a hearing was held before Judge Stuckey with respect to the Motions that had been noticed for hearing, and the Motions (except for the Motion to Consolidate, which was withdrawn) were taken under advisement. L.F. 371.

Legal Aid of Western Missouri, Legal Services of Eastern Missouri and Mid-Missouri Legal Services later appeared as Amici Curiae and submitted Suggestions (L.F. 411, 569) and an Appendix of Selected Cases (L.F. 425).

On November 27, 2001, Judge Stuckey entered his Order and Judgment. L.F. 371; set forth in Appendix A at A-1.

POINTS RELIED ON

I.

The trial court did not err as asserted in Appellant’s Points I through X inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the “receipt, investment, custody and disbursement of state funds and funds received from the United States government” and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the “single subject” and “clear title” provisions of Article III, Section 23, Missouri Constitution.

Cases

Board of Public Buildings v. Crowe, 363 S.W.2d 598 (Mo. banc 1962)

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974)

Carmack v. Director, Department of Agriculture, 945 S.W.2d 596 (Mo. banc 1997)

Other Authorities

Article IV, Section 15, 1945 Missouri Constitution

Debates, Missouri Constitutional Convention – June 1944

Article IV, Sections 13, 14 and 22, 1945 Missouri Constitution

Article IV, Section 15, Missouri Constitution, as amended in 1986

Article III, Section 23, Missouri Constitution

Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for

House Bill No. 566, 87th General Assembly, First Regular Session

Sections 447.575, 447.532.1, 447.503(7), 447.539, 447.543 and 447.517, RSMo 2000

Opinion No. 110 of Attorney General Danforth, January 12, 1970

II.

The trial court did not err as asserted in Appellant's Points I through X because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. banc 1982)

Van Gemert v. Boeing Company, 739 F.2d 730 (2nd Cir. 1984)

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. Bank 1986)

Friar v. Vanguard Holding Corp., 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)

Other Authorities

Article V, Sections 1, Missouri Constitution

Article V, Section 14, Missouri Constitution

Article V, Sections 3, 4 and 8, Missouri Constitution

Article II, Section 1, Missouri Constitution

Section 447.532, RSMo 2000

Section 456.010, RSMo 2000

Section 456.210, RSMo 2000

Chapter 456, RSMo 2000

Kevin M. Forde, *What Can A Court Do With Leftover Class Action Funds? Almost Anything!*”, 35 Judges Journal 19 (Summer 1996, American Bar Association)

III.

The trial court did not err as asserted in Appellant’s Points I through X because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965)

Other Authorities

Section 447.532.1, RSMo 2000

Section 447.503(7), RSMo 2000

IV.

The trial court did not err as asserted in Appellant's Point III inasmuch as interest upon the funds in this case may be used and disbursed as provided in the Order Appointing Receiver, the Order Establishing Trust and in Section 483.310.2, RSMo.

Other Authorities

Section 483.310, RSMo 2000

V.

The trial court did not err as asserted in Appellant's Point IV inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

Cases

Angelo v. City of Hazelwood, 810 S.W.2d 706 (Mo. App. E.D. 1991)

VI.

The trial court did not err as asserted in Appellant's Points V, VI, VII, VIII, IX and X inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in this case, any claim to the funds held in this case must be asserted in this case, the Circuit Court has the authority to require persons claiming funds held in this

case to appear and show their entitlement to the funds, the Appellant was properly served with the July 20, 2001, Order and the Motion and Petition, and the Appellant is not entitled to any order of disqualification.

Cases

State ex rel. Sullivan v. Reynolds, 107 S.W. 487 (Mo. banc 1907)

Brady v. Ansehl, 787 S.W.2d 823 (Mo. App. E.D. 1990)

Robin Farms, Inc. v. Bartholomew, 989 S.W.2d 238

State ex rel. Gleason v. Rickhoff, 541 S.W.2d 47 (Mo. App. E.D. 1977)

Other Authorities

Supreme Court Rule 66.02

Supreme Court Rule 52.07

Supreme Court Rule 54.01

Supreme Court Rule 44.01(d)

ARGUMENT

I.

The trial court did not err as asserted in Appellant’s Points I through X inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the “receipt, investment, custody and disbursement of state funds and funds received from the United States government” and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the “single subject” and “clear title” provisions of Article III, Section 23, Missouri Constitution.

Respondent Healey adopts by reference as her arguments for this Point I the arguments set forth by Respondent Smith in Point I of her Brief in SC84210, Point I in that Brief being identical to Point I in this Brief.

Respondent Healey does, however, set forth here the authorities which are set forth in the Brief of Respondent Smith in SC84210:

Article IV, § 15, 1945 Missouri Constitution

Debates, Missouri Constitutional Convention, June 1944

Article IV, § 13, 1945 Missouri Constitution

Article IV, § 14, 1945 Missouri Constitution

Article IV, § 22, 1945 Missouri Constitution

Article IV, § 15, Current Missouri Constitution

Article III, § 23, Current Missouri Constitution

Article III, § 36, Current Missouri Constitution

Article IV, § 36(a), Current Missouri Constitution

Article X, § 15, 1875 Missouri Constitution

Article X, § 17(1), Current Missouri Constitution

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to 447.595,

RSMo

Board of Public Buildings v. Crowe, 363 S.W.2d 598 (Mo. banc 1962)

Blydenburg v. David, 413 S.W.2d 284 (Mo. banc 1967)

Opinion No. 110 of Attorney General Danforth, January 12, 1970

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974)

Buechner v. Bond, 650 S.W.2d 611 (Mo. banc 1983)

*State ex rel. Thompson v. Board of Regents for Northeast Missouri State
Teachers'*

College, 264 S.W. 698 (Mo. banc 1924)

Howell v. Division of Employment Security, 215 S.W.2d 467 (Mo. 1948)

Conference Committee Substitute for Senate Committee Substitute for

House Committee Substitute for House Bill No. 566, 87th General

Assembly, First Regular Session

Carmack v. Director, Department of Agriculture, 945 S.W.2d 956

(Mo. banc 1997)

Home Builders Association of St. Louis v. State, Case No. SC83863,

2002 WL 1051989, ____ S.W.3d ____ (Mo. banc May 28, 2002)

Kelly v. Hanson, 931 S.W.2d 816 (Mo. App. W.D. 1996)

State v. Planned Parenthood, 66 S.W.3d 16 (Mo. banc 2002)

Wilkes v. The King, (1768) Wilm. at pp. 327

Cooley, “Predecessors of the Federal Attorney General: The Attorney General

in England and the American Colonies”, *The American Journal of Legal*

History, Vol. 2, pages 304, 307 (1958)

Section 447.503(7), RSMo 2000

Section 447.517, RSMo 2000

Section 447.532.1, RSMo 2000

Section 447.539, RSMo 2000

Section 447.543, RSMo 2000

Section 447.575, RSMo 2000

House Bill No. 1088, 82nd General Assembly, Second Regular Session

Section 100.260, RSMo 2000

Section 104.150, RSMo 2000

Section 104.440, RSMo 2000

Sections 288.290 through 288.330, RSMo 2000

Supreme Court Rule 6.04

Supreme Court Rule 7

Supreme Court Rule 7.02

II.

The trial court did not err as asserted in Appellant’s Points I through X because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

Respondent Healey adopts by reference as her argument for this Point II the arguments set forth by Respondent Smith in Point II of her Brief in SC84210, Point II in that Brief being identical to Point I in this Brief.

In addition to the reasons set forth in the Brief of Respondent Smith in SC84210, the facts in this case reflect other and additional reasons why relief cannot be granted to the Appellant in this case.

On January 18, 1991, Judge Kinder entered an “Order Establishing Trust for Undistributed Class Action Proceeds”. See Statement of Facts, *supra* at pages 25-27. No modification of that Order has been made, no original writ proceedings have been addressed to that Order and no appeal has been taken from the January 18, 1991, Order either heretofore or in the context of this appeal.

All of the funds in this case were transferred to the Trust created by that Order. Subject to subsequent amendments, the income from that Trust has been dedicated to Cole County, the Court having first found and determined –

“the court believes that the income which results from the investment of the fund should be used for purposes consistent with those underlying the Settlement Agreement. It is the opinion of the court that one such purpose would be the provision of monies to

make the courts of this county better able to resolve major litigation matters of statewide interest, such as the action which gave rise to this settlement.” (Emphasis added). L.F.

73.

The Trust created then provides:

- Income from Trust – “The trustee shall hold, manage, invest and reinvest the property of the trust, shall collect and receive the income therefrom, and after deducting all necessary expenses incident to the administration of the trust, shall dispose of the net income by paying over to the Cole County Commission, from time to time, those amounts of such income which have accumulated since the last such payment was made.” L.F. 73-74.
- Payments from Principal – “Nonetheless, and any other provision of this order to the contrary notwithstanding, the trustee shall, at any time, cause such amounts from the principal of the trust estate, up to the whole amount thereof, to be paid or applied for the benefit of any claimant entitled – in the opinion of the trustee, after due consultation with Class Attorneys – to share in the fund created by the Settlement Agreement.” L.F. 74.

The Order of January 18, 1991, creating the Trust qualifies as a declaration of trust under the long-standing statutes of Missouri relating to the creation of trusts. See Section 456.010, RSMo, which traces back to 1825. The Circuit Court has long had jurisdiction over Trusts. Once a Circuit Court appoints a trustee of a Trust, the Circuit Court under the provisions of Section 456.210, RSMo –

“may . . . retain jurisdiction for the purpose of entertaining later proceedings. . . .”

Section 456. 210, RSMo. Other provisions of Chapter 456, RSMo, authorize a circuit court to

exercise continuing jurisdiction with respect to a trust over which it secures any jurisdiction.

Consequently, the Cole County Circuit Court has continuing jurisdiction over the trust in this case, and the Appellant is not entitled to any relief.

Respondent Healey does, however, set forth here the authorities which are set forth in the Brief of Respondent Smith in SC84210:

Article II, § 1, Current Missouri Constitution

Article V, § 1, Current Missouri Constitution

Article V, § 14, Current Missouri Constitution

Article V, § 3, Current Missouri Constitution

Article V, § 4, Current Missouri Constitution

Article V, § 8, Current Missouri Constitution

State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. banc 1970)

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228

(Mo. banc 1997)

Missouri Coalition for the Environment v. Joint Committee on Administrative

Rules, 948 S.W.2d 125 (Mo. banc 1997)

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69

(Mo. banc 1982)

United States v. Morgan, 307 U.S. 183 (1937)

Market Street Railway Co. v. Railroad Commission, 171 P.2d 875

(Cal. Bank 1946)

State ex rel. South Missouri Pine Lumber Co. v. Dearing, 79 S.W. 454

(Mo. banc 1904)

State ex rel. Hampe v. Ittner, 263 S.W.2d 158 (Mo. 1924)

Van Gemert v. Boeing Company, 739 F.2d 730 (2nd Cir. 1984)

Friar v. Vanguard Holding Corp., 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)

Kevin M. Forde, “*What Can A Court Do With Leftover Class Action Funds?*

Almost Anything!”, 35 Judges’ Journal 19 (Summer 1996, American Bar Association). A copy of this article is set forth in Appendix B of this

Brief at A-05.

Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997)

Democratic Central Committee of the District of Columbia v. Washington

Metropolitan Area Transit Commission, 84 F.3d 451 (D.C. 1996)

Houck v. Folding Carton Administration Committee, 881 F.2d 494 (7th Cir.

1989), *on remand sub nom. In Re Folding Carton Antitrust Litigation*,

No. MDL 250, 1991 WL 32857 (N.D. Ill. March 6, 1991)

Jones v. National Distillers, 56 F.Supp.2d 355 (S.D. N.Y. 1999)

Northern Natural Gas Co. v. Federal Power Commission, 225 F.2d 886

(8th Cir. 1954)

In Re Wells Fargo Securities Litigation, 991 F.Supp. 1193 (N.D. Cal. 1998)

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. Bank 1986)

In Re Miamisburg Train Derailment Litigation, 635 N.E.2d 46 (Ohio App. 1993)

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to

447.595, RSMo

28 U.S.C. § 2041

28 U.S.C. § 2042

Section 447.532, RSMo 2000

III.

The trial court did not err as asserted in Appellant's Points I through X because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

Respondent Healey adopts by reference as her arguments for Point III the arguments set forth by Respondent Smith in Point III of her Brief in SC84210, Point III in that Brief being identical to Point III in this Brief.

Respondent Healey does, however, set forth here the authorities which are set forth with respect to Point III in the Brief of Respondent Smith in SC84210:

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to

447.595, RSMo

Section 447.503(7), RSMo 2000

Section 447.532.1, RSMo 2000

House Bill No. 1088, 82nd General Assembly, Second Regular Session

State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965)

IV.

The trial court did not err as asserted in Appellant's Point III inasmuch as interest upon the funds in this case may be used and disbursed as

provided in the Order Appointing Receiver, the Order Establishing Trust and in Section 483.310.2, RSMo.

Respondent Healey adopts by referenced as her arguments for this Point IV the arguments set forth in Respondent Smith in Point IV of her Brief in SC84210, Point IV in that Brief being substantially similar to Point IV in this Brief.

Respondent Healey does, however, set forth here the authority which is set forth with respect to Point IV in the Brief of Respondent Smith in SC84210:

Section 483.310, RSMo

V.

The trial court did not err as asserted in Appellant's Point IV inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

Respondent Healey adopts by reference as her arguments for this Point V the arguments set forth by Respondent Smith with respect to Point V of her Brief in SC84210, Point V in that Brief being identical to Point V in this Brief.

Respondent Healey does, however, set forth here the authorities which are set forth with respect to Point V in the Brief of Respondent Smith in SC84210:

Angelo v. City of Hazelwood, 810 S.W.2d 706 (Mo. App. E.D. 1991)

VI.

The trial court did not err as asserted in Appellant's Points V, VI, VII, VIII, IX and X inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in this case, any claim to the funds held in this case must be asserted in this case, the Circuit Court has the authority to require persons claiming funds held in this case to appear and show their entitlement to the funds, the Appellant was properly served with the July 20, 2001, Order and the Motion and Petition, and the Appellant is not entitled to any order of disqualification.

Respondent Healey adopts by reference as her arguments for this Point VI the arguments set forth by Respondent Smith with respect to Point VI of her Brief in SC84210, Point VI in that Brief being identical to Point VI in this Brief.

Respondent Healey does, however, set forth here the authorities which are set forth with respect to Point VI in the Brief of Respondent Smith in SC84210:

State ex rel. Sullivan v. Reynolds, 107 S.W. 487 (Mo. banc 1907)

Neun v. Blackstone Building & Loan Association, 50 S.W. 436 (Mo. 1899)

Supreme Court Rule 66.02

Supreme Court Rule 52.07

Crist v. ISC Financial Corp., 752 S.W.2d 489 (Mo. App. W.D. 1988)

Brady v. Ansehl, 787 S.W.2d 823 (Mo. App. E.D. 1990)

Roosevelt Federal Savings & Loan Association v. First National Bank of Clayton,

614 S.W.2d 289 (Mo. App. E.D. 1981)

Supreme Court Rule 54.01

Supreme Court Rule 54.02

American Refractories Co. v. Combustion Controls, 70 S.W.3d 660

(Mo. App. S.D. 2002)

State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24

(Mo. App. W.D. 1984)

State on Inf. of Attorney General v. Arkansas Lumber Co., 190 S.W. 894

(Mo. banc 1916))

Ainsworth v. Old Security Life Insurance Co., 685 S.W.2d 583

(Mo. App. W.D. 1985)

In Re Transit Casualty Co. in Receivership, Pulitzer Publishing Co. v.

Transit Casualty Co. in Receivership, 43 S.W.3d 293 (Mo. banc 2001)

Clay v. Eagle Reciprocal Exchange, 368 S.W.2d 344 (Mo. 1963)

In Re Transit Casualty Co. in Receivership v. William Blair Realty

Partners, II, v. Transit Casualty Co. in Receivership, 900 S.W.2d 671

(Mo. App. W.D. 1995)

Article II, § 1, Current Missouri Constitution

Supreme Court Rule 51.07

Supreme Court Rule 2, Canon 3

Article V, § 4, Current Missouri Constitution

State ex rel. Buchanan v. Jensen, 379 S.W.2d 529 (Mo. banc 1964)

Robin Farms, Inc. v. Bartholomew, 989 S.W.2d 238 (Mo. App. W.D. 1999)

State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996)

Supreme Court Rule 44.01(d)

State ex rel. Gleason v. Rickhoff, 541 S.W.2d 47 (Mo. App. E.D. 1977)

Jenkins v. Jenkins, 784 S.W.2d 640 (Mo. App. W.D. 1990)

CONCLUSION

For the reasons set forth in the Brief of Respondent Smith in SC84210 and hereinabove, the Order and Judgment entered by Judge Stuckey on November 27, 2001, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and
2. That this Brief contains 10,735 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.
3. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.
4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

Alex Bartlett

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief along with a double-sided, high-density IBM PC compatible disk with the text of the Brief were hand-delivered or mailed via United States Mail, postage prepaid, on July 18, 2002, to Mr. James McAdams, Office of the Missouri Attorney General, P. O. Box 899, Jefferson City, MO 65102, attorney for Appellant Nancy Farmer, to Henry T. Herschel, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, MO 65101, attorney for Respondent Cole County, and to J. Kent Lowry, Armstrong, Teasdale, LLP, 3405 West Truman Boulevard, Jefferson City, MO 65109, attorney for Respondent Debbie Cheshire.

Alex Bartlett